No. 14787

# In the
# United States Court of Appeals
## For the Ninth Circuit

RICHARD WAYNE FRANK,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

## Petition for Rehearing

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## Petition for Rehearing

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of Judgment entered by the Court on June 25, 1956, affirming the judgment of the court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features of the decision wherein he believes the Court may be convinced its opinion is incorrect.

The Court committed error in holding that the record showed no harm had been done appellant by the failure to reopen and the failure to have advisors.

The slip opinion (p. 5) states:

> "We have previously held that the mere failure to appoint such advisors or the failure to post the names and addresses is not *per se* a denial of due process and that lack of due process exists only when substantial prejudice is shown."

The slip opinion (p. 6) states:

> "Next, appellant argues that he was denied due process when the Local Board refused to reopen, or to even consider reopening his classification. We hold against appellant on this point."

The slip opinion (p. 7) states:

> "The letter that appellant submitted was no a request for reopening, and even if we combine the letter with the pamphlet it still does not constitute a written request for a reopening."

The holding of the Court that appellant did not make a proper, written request for reopening *per se* establishes harm; he could hardly have been more "substantially prejudiced." It must be assumed that if he had the help of an Advisor he would have made a *good* request for reopening; also, that he would have filed a *timely* request for personal appearance and appeal.

A recent decision, made after the oral argument in this appellant's case, supports appellant's position. In *United States vs. Howard Louis Schwartz,* Cr. No. 43793, E.D. N.Y., decided March 15, 1956, Judge Abruzzo pointed out that:

"A registrant is not entitled to the aid of counsel before a local board. *United States vs. Pitt,* 144 F. 2d 169 (C.A. 2d); *Peterson vs. United States,* 173 F. 2d 11 (C.A. 6th); *Niznik vs. United States,* 173 F. 2d 328 (C.A. 6th). He, therefore, must depend upon the advisors for counsel as to his rights to a proper classification.

"The decisions are legionary that each and every requirement in the Selective Service Act must be strictly complied with. After he was classified I-O the defendant requested a reopening of his case and a setting aside of this classification on the ground that he was the sole support of his mother and father. The defendant testified that when he filed in the questionnaire he did not know that he could make a claim for exemption on two grounds, to wit, that he was a minister of religion and also the sole support of his mother and father. He did not urge the support of his mother and father because he was under the erroneous impression tht he could not claim more than one exemption at the same time, but if there had been a posted list of advisors he could have determined that he was entitled to make a claim of exemption on both grounds.

"The absence of such a posted list is vital in determining the guilt or innocence of this defendant.

"When defendant made application before the board for a reopening of his case in order that he might produce evidence that he was the sole support of his parents, the local board denied him this right. In view of the circumstances this right should have been granted. The proof offered by

> the Government that a list of advisors was visible somewhere in the local board after 1948 is vague and uncertain. The Government had the burden of proving the defendant guilty beyond a reasonable doubt. This burden they have not sustained."

The slip opinion (p. 7) states that the pamphlet presented by him "does not in any way mean the speaker is a minister." An advisor could have learned of Frank's current further ministerial activity and of his actual status as a minister and could have advised him (a) of the standard required by the law and regulations, to wit, "vocation" and (b) of the manner of presentation the regulations require to justify a reopening. It is common knowledge that appellant's type of religious activity has, in many instances, met the standards required for a selective service ministerial classification. Public sermons, such as the one advertised in the pamphlet, are obviously part of the ministerial activity of one of Jehovah's witnesses. That it, presented alone, and without further explanation, could and did justify the conclusion reached by this Court is something a selective service registrant can be excused for not realizing. An advisor could have set him straight, namely, that detailed explanation, etc., etc., should be presented in writing to meet the standard of the law.

We do not know from the record if appellant could have met the standard; we do know from the record he didn't have the opportunity for the advice then *required* by the law.

Wherefore, upon the foregoing ground, and for other reasons, appearing in appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ
*Attorney for Appellant.*